(15,374.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 990.

MILTON HUMES AND C. C. HARRIS, PLAINTIFFS IN ERROR,

vs.

THE THIRD NATIONAL BANK OF CHATTANOOGA, TENNESSEE.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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1 UNITED STATES OF AMERICA,
Fifth Judicial Circuit.

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals begun and held, pursuant to law, in the court-room of said court, in the city of New Orleans, on the third Monday of November, A. D. 1892.

Present and presiding: The Honorable Don A. Pardee, United States circuit judge for the fifth circuit; present also, the Honorable A. P. McCormick, United States circuit judge for the fifth circuit, and the Honorable James W. Locke, United States district judge for the southern district of Florida.

E. C. GORDON, MILTON HUMES, and C. C. HARRIS
v.
THIRD NATIONAL BANK OF CHATTANOOGA.

Be it remembered that on the 17th day of May, 1893, a transcript of the record in the above-styled cause, in the United States circuit court for the northern district of Alabama, was filed in the United States circuit court of appeals for the fifth circuit as follows, to wit:

2 THE UNITED STATES OF AMERICA,
Northern District of Alabama, Northern Division.

Pleas had at a regular term of the circuit court of the United States of America for the northern division of the northern district of Alabama, begun and held at the United States court-rooms, in the city of Huntsville, in said district, on the second Monday of October, it being the tenth day thereof, in the year of our Lord one thousand eight hundred and ninety-two, and of the Independence of the United States the one hundred and seventeenth year.

Present: The Hon. John Bruce, judge of the district courts of the United States for the middle and northern districts of Alabama, presiding; A. R. Nininger, marshal, and N. W. Trimble, clerk.

Motion for Execution.

In the Circuit Court of the United States for the Northern District of Alabama, Northern Division.

THE THIRD NATIONAL BANK OF CHATTANOOGA
vs.
E. C. GORDON. No. 1444.

Comes The Third National Bank of Chattanooga, the plaintiff in the above-entitled cause, and shows to this honorable court that E. C. Gordon, the defendant, prayed and obtained a writ of error from the judgment and proceedings had in this court touching said

cause, to the honorable Supreme Court of the United States, all of which fully appears from the records of this court.

That the defendant, the said E. C. Gordon, together with C. C. Harris and Milton Humes, did on the 17th day of April, 1888, execute an appeal bond in manner and form as required by law in such cases, in the full and just sum of ten thousand five hundred dollars, payable to the Third National Bank of Chattanooga, Tennessee, etc. That said bond together with the sureties thereto was approved by Honorable Harry T. Toulmin, district judge. Said bond is referred to and made a part of this application.

Petitioner further shows unto your honor that said writ of error in the above entitled cause has been duly considered, passed on and in all things determined and affirmed by the honorable Supreme Court of the United States, as is shown by the mandate of said Supreme Court, which was filed in this court on the 6th day of June, 1892, and recorded in Minute Book I, page 421, and is here now presented to this honorable court as a part of this application.

Petitioner prays that in accordance with the judgment and mandate of the honorable Supreme Court of the United States that this court order an execution in manner and form as required by law to issue against the property, goods and effects of E. C. Gordon, C. C. Harris and Milton Humes for the amount of said judgment, to wit:

3 five thousand two hundred and eighty-six dollars and sixty-seven cents with costs and interest from the date of rendition of said judgment in this court, to wit: the 14th day of April, 1888, together with all the damages allowed on such judgments under the laws of the State of Alabama.

And that notice of this application be given to E. C. Gordon, C. C. Harris and Milton Humes to show cause, if any they have, why the prayer of this petition shall not be granted.

WILLIAM RICHARDSON,
Att'y for 3rd Nat'l Bank, etc.

Endorsed thereon: Filed in clerk's office September 19, 1892. N. W. Trimble, clerk.

Proof of Service.

Executed by serving a copy of the within motion on Milton Humes, Esqr., September 21, 1892, and also serving a copy on C. C. Harris, September 24, 1892, and E. C. Gordon, September 28, 1892.

A. R. NININGER,
U. S. Marshal,
By JNO. F. LANIER, *Deputy.*

Returned and filed October 3, 1892.

N. W. TRIMBLE, *Clerk.*

Notice of Motion.

THIRD NATIONAL BANK OF CHATTANOOGA
vs.
E. C. GORDON.

To E. C. Gordon, Milton Humes and C. C. Harris:

This is to notify you and each of you, that on the 12th day of October, 1892, when the above-entitled cause is called in the United States circuit court at Huntsville, the Third National Bank of Chattanooga by attorney will make and enter a motion asking for a judgment against each of you upon the supersedeas bond executed by each of you in the above-entitled cause, on the 14th day of April, 1888, and approved on the 17th day of April, 1888, and that execution issue for the amount of the judgment, interest, costs and damages, as prayed for.

(Signed) WHITE & MARTIN AND
WILLIAM RICHARDSON,
Att'ys for 3rd Nat'l Bank, Chattanooga.

(Marshal's endorsement:) Executed by serving a copy of the within notice on Milton Humes, Esqr., September 26, 1892; also by serving a copy on E. C. Gordon and C. C. Harris, this 28th day of September, 1892. (Signed) A. R. Nininger, U. S. marshal, by Jno. F. Lanier, deputy.

And afterwards, to wit, on the twelfth day of October, 1892, further proceedings were had and entered of record in this cause in words and figures as follows, to wit:

Journal Entry, October 12, 1892, *Minute Book "I," fol.* 452.

THIRD NATIONAL BANK OF CHATTANOOGA
vs.
EUGENE C. GORDON.

Be it remembered that on this the 12th day of October, 1892, when this cause was regularly reached on the docket, and
4 called for trial, the plaintiff pursuant to notice heretofore given to defendant E. C. Gordon, and sureties on his supersedeas bond, C. C. Harris and Milton Humes, presented in open court the said supersedeas bond given in this case, dated *to* 14th day of April, 1888, and approved the — day of ——; the said bond being in words and figures as follows, to wit:

"Know all men by these presents, that we Eugene C. Gordon, C. C. Harris, and Milton Humes, are held and firmly bound unto the Third National Bank of Chattanooga, Tennessee, in the full and just sum of ten thousand and five hundred dollars, to be paid to the said Third National bank, its certain attorneys, administrators or assigns, to which payment well and truly to be made we bind our-

selves, our heirs, executors and administrators, jointly and severally by these presents.

"Sealed with our seals, and dated the 14th day of April, in the year of our Lord one thousand eight hundred and eighty-eight.

"Whereas lately at a regular term in a suit depending in the circuit court of the United States, for the northern division of the northern district of Alabama, between the Third National Bank of Chattanooga, Tennessee, and Eugene C. Gordon, judgment was rendered against the said Gordon, and the said Gordon having prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment aforesaid, and a citation having issued, directed to the said Third National Bank of Chattanooga, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October next. Now the condition of the above obligation is such, that if the said Gordon shall prosecute his writ of error to effect, and answer all damages and costs, if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

"(Signed) E. C. GORDON. [SEAL.]
"C. C. HARRIS. [SEAL.]
"MILTON HUMES. [SEAL.]

"Sealed and delivered in the presence of—
"HARRY T. TOULMIN,
"*District Judge.*

"C. C. Harris and Milton Humes, being duly sworn, depose and say, and each for himself sayeth, that he is worth $10,500 over and above all just debts and liabilities and exemptions.

"(Signed) C. C. HARRIS.
"MILTON HUMES.

"Sworn to this 17th day of April, 1888, before me.

——— ———.

"Approved the within bond and sureties thereto.
"(Signed) HARRY T. TOULMIN,
"*District Judge.*"

And also produce the mandate from the Supreme Court in this case, filed on the 6th day of June, 1892, said mandate being in words and figures as follows, to wit:

5 "UNITED STATES OF AMERICA, *ss:*

"The President of the United States of America to the honorable the judges of the circuit court of the United States for the northern district of Alabama, Greeting: [SEAL.]

"Whereas, lately in the circuit court of the United States, for the northern district of Alabama, before you or some of you, in a cause between the Third National Bank of Chattanooga, Tennessee, plaintiff, and Eugene C. Gordon, defendant, wherein the judgment of the

said circuit court, entered in said cause, on the 14th day of April, A. D. 1888, is in the following words, viz:

"This being the day and hour to which the further trial of this cause was, on yesterday, continued, come again the parties by their attorneys, come again the jury who were duly elected, empanelled and sworn, herein as aforesaid, and the trial of this cause proceeds.

"After having heard the evidence by parties adduced, arguments of counsel, and charge of the court, the jury retire to their room to consider of their verdict, and afterwards return into court, and render their verdict in writing, signed by their foreman; and upon their oath do say: "We, the jury, find for the plaintiff, and assess the damages at the sum of five thousand two hundred and eighty-six and $\frac{67}{100}$ dollars.

"(Signed) PETER M. DOX, *Foreman.*"

"It is therefore considered by the court that the plaintiff have and recover of the defendant said sum of five thousand two hundred and eighty-six $\frac{67}{100}$ dollars, so by the jury assessed as aforesaid, together with the costs in this behalf expended, for which let execution issue; as by the inspection of the transcript of the record of said circuit court which was brought into the Supreme Court of the United States, by virtue of a writ of error agreeably to the acts of Congress, in such case made and provided, fully and at large appears.

"And whereas, in the present term, of October, in the year of our Lord, one thousand eight hundred and ninety-one, the said cause came on to be heard, before the Supreme Court, on the said transcript of record, and *were* argued by counsel.

"In consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause, be, and the same is hereby affirmed with costs and interest until paid, at the same rate per annum that similar judgments bear in the courts of the State of Alabama; and that the said plaintiff recover against the said defendant, Eugene C. Gordon, for its costs herein expended and have execution therefor.

(March 21, 1892.)

"You, therefore, are hereby commanded that such execution and proceedings be had in said cause, as according to right and justice and the laws of the United States, ought to be had, the said writ of error notwithstanding.

6 "Witness the Honorable Melville W. Fuller, Chief Justice of said Supreme Court, the 31st day of May, in the year of our Lord one thousand eight hundred and ninety-two.

"(Signed) JAMES H. McKENNEY,

"*Clerk of the Supreme Court of the United States.*"

And moved the court for judgment against the defendant, E. C. Gordon, and sureties on said supersedeas bond, C. C. Harris and Milton Humes.

Thereupon, the defendants, E. C. Gordon, C. C. Harris and Milton Humes, appeared by attorney and resisted said motion, and filed

a demurrer to said motion, and said motion and demurrer being argued for plaintiff and defendants, the court is pleased to order that said motion be entered upon the minutes of the court, and the same is taken under advisement by the court and held for further consideration.

Defendants' Demurrer.

In the Circuit Court of the United States for the Northern Division, Northern District of Alabama, October Term, 1892.

THIRD NATIONAL BANK OF CHATTANOOGA
vs.
E. C. GORDON, C. C. HARRIS, and MILTON HUMES.

Comes the defendants, C. C. Harris and Milton Humes, by attorney, and demur to the notice and motion filed against them by the plaintiff, and for cause of demurrer assign:

1. That this court is without jurisdiction to order the issue of an execution against these defendants as prayed for in said motion, or petition.

2. That the said motion or petition does not make a case of which this court can take cognizance.

3. That the statutes of the State of Alabama allowing damages on judgment affirmed on writ of error or appeal, are not applicable to judgments affirmed by the Supreme Court of the United States.

Wherefore defendants pray the judgment of this court whether they shall make further or other answer.

(Signed) ROBERT C. BRICKELL,
Attorney for Defendants.

(Endorsed:) Filed October 12th, 1892. N. W. Trimble, clerk.

Opinion Overruling Demurrer.

In the Circuit Court of the United States for the Northern Division of the Northern District of Alabama.

THIRD NATIONAL BANK OF CHATTANOOGA
vs.
E. C. GORDON.

Heard on motion for judgment against sureties upon supersedeas bond.

BRUCE, *J.*:

In this cause the plaintiff bank recovered a judgment in this court against the defendant Gordon for the sum of five thousand two hundred and eighty-six and $\frac{67}{100}$ dollars, on the 14th day of April, 1888.

7 An appeal was prayed and allowed to the Supreme Court of the United States, and a supersedeas bond was approved and filed in this court on the 17th day of April, 1888.

The judgment was affirmed in the Supreme Court of the United States, and a mandate in the usual form was received and filed in this court on the 6th day of June, 1892.

The plaintiff bank now comes and by motion asks that he have judgment and execution against the sureties on the supersedeas bond for the amount of his judgment, interest and costs, including the costs in the Supreme Court.

The defendant in the judgment has had his appeal and hearing in the appellate court and he has had a supersedeas of the judgment in the court below, which he obtained by giving the bond, according to rule 29 of the Supreme Court of the United States, which provides:

Supersedeas bonds in the circuit courts must be taken with good and sufficient security, that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good.

In this case the appellant has failed to make his plea good; the condition of the supersedeas bond has been broken and in the words of rule 29 the sureties on the supersedeas bond are to answer all damages and costs, which means that they are to answer the plaintiff's judgment and costs.

Does that mean simply that the sureties are to be liable in a suit against them? Is their liability on a bond of this character to be the subject of another suit, or is there not a more summary remedy as the bond contemplated?

It has been held that it is not necessary in order to charge the sureties upon an appeal bond that an execution on the judgment recovered in the appellate court should be issued against the principal.

Babbett *vs.* Finn, 101 U. S., 15, and in that case the court says: "When they execute the bond they assume the obligation that they will answer all damages and costs if the principal fails to prosecute his appeal to effect and make his plea good, from which it follows that if the judgment is affirmed by the appellate court either directly or indirectly by a mandate sent down to the subordinate court the sureties *proprio vigore* became liable to the same extent as the principal or obligator."

It is true the case the court was considering was not the case here, but certainly the reasoning of the court is to the effect that an appeal and supersedeas bond is something more than a mere liability for the amount of the plaintiff's judgment and costs to be made effective only upon a suit upon the bond.

If it is not required to exhaust the remedy against the principal on the bond before proceeding against the sureties, and if the sureties are liable to the same extent as the principal obligor then what more is required than that there should be judgment and execution against these sureties as there is against the principal obligor.

8 The nature and character of a supersedeas bond seems to imply a more summary remedy upon it than a suit to enforce it.

The plaintiff's judgment is superseded, and he is for the time de-

prived of his remedy by execution to obtain the fruits of his judgment. The supersedeas bond is given and approved by the judge of the court in which the cause was heard and the judgment obtained, and the giving and acceptance of such bond is to some extent like a confession of judgment if the appellant fails to maintain his contention in the appellate court.

The end of the litigation was reached in the court below when the judgment was rendered against the defendant, and presumably the plaintiff could by execution collect his claim, the defendant, however, seeks an appeal and supersedeas, as of right he may, but upon what condition, not simply that he will answer to the damages and costs if he fails to make his plea good, but his undertaking is to be with good and sufficient security that he shall prosecute his writ to effect and answer all damages and costs if he fail to make his plea good.

The sureties on the bond must be held to have known what their obligation was when they signed it, and does it not clearly mean that as the matter in the appellate court shall terminate as to the principal obligor in the bond, so in like manner it shall be as to the sureties on his bond. Can it be that one result is to fall to the principal on the bond, that is, on the affirmance of the judgment in the appellate court, judgment and execution is to follow in the court below against the principal, a suit only to enforce the liability of sureties on the bond.

Is it not more reasonable that but one result is to follow, and as that result shall fall to the principal obligor in the bond so it falls to the sureties on the bond, and that the court upon motion as in this case, will give judgment and execution, not only as to the principal, but also and equally against the security on the bond.

It is said that the court has no power or jurisdiction to render such judgment. That there is no act of Congress giving the court such power which may be conceded, and that there is no State legislation in Alabama which authorizes such practice, which may also be conceded, but whether there is State legislation touching the subject or not, the Supreme Court of the United States would not be influenced by it, and the mandate to the judges of the court below is:

"That such execution and proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding."

The case comes back to the court below with the writ of error or appeal eliminated from the cause, and the condition of the supersedeas bond broken, and the court is again in possession of the cause with power to give such remedy as the plaintiff may be entitled to.

The practice in admiralty seems to be settled as to stipulations in appeal bond, and as has been suggested, it is difficult to
9 see why the rule should not be the same in all cases. Under the practice act of 1872, the courts of the United States sitting in the various States are to conform to the practice, proceedings and modes of proceeding of the State in which the court is held,

but only as near as may be, and the State statutes do not give or take away the jurisdiction of the Federal courts, still it may be noted that Alabama like other States of the Union has by statute given summary remedies upon appeal and supersedeas bonds, and in doing so has only done that which ought to be done in providing speedy remedies to parties who come into courts in pursuit of their legal rights, and who succeed in making their cause good.

Any other practice would seem like a step backwards, and while the authorities cited may not and do not go to the precise question involved here, they are persuasive and show the spirit and tendency not only of legislative but also of judicial decision on this subject. Beal *vs.* New Mexico, 16 Wall., 539; Smith *et als. vs.* Garnes, 93 U. S., 341.

And afterwards, on the thirty-first day of October, further proceedings were had and entered of record *of* this cause, in words and figures as follows, to wit:

Journal Entry, October 31*st*, 1892, *Minute Book* "*J*," *fol.* 1.

THIRD NATIONAL BANK OF CHATTANOOGA }
vs.
E. C. GORDON, C. C. HARRIS, and MILTON HUMES. }

This cause coming on for further hearing, upon the motion of the plaintiff for judgment against the defendants herein, upon the mandate from the Supreme Court and the supersedeas bond set out in said motion, which motion was made and entered of record in this court on the 12th day of October, 1892, and the demurrer of said defendants, E. C. Gordon, C. C. Harris and Milton Humes, thereto, and said motion having been considered by the court, the court is of the opinion that the said motion is well taken, and sustains the same, and the causes of demurrer interposed by defendants to said motion are each and all overruled and disallowed.

And it appearing to the satisfaction of the court, from the papers set forth in said motion that the plaintiff, the said Third National Bank of Chattanooga, on the 14th day of April, 1888, recovered a judgment against the said defendant E. C. Gordon, for five thousand two hundred and eighty-six $\frac{6}{100}$ dollars, and all costs in this court in this case, and that afterwards the said defendant E. C. Gordon sued out a writ of error in the Supreme Court of the United States, and superseded said judgment, and on the said 14th day of April, 1888, executed and filed with the clerk of this court a supersedeas bond which was duly approved in the sum of ten thousand and five hundred dollars, conditioned as required by law, with the said defendants C. C. Harris and Milton Humes, as sureties thereon, and *a* further appearing from an inspection of the mandate from the Supreme Court of the United States, set forth in said
10 motion, that the said E. C. Gordon's writ of error was dismissed and the judgment of this court affirmed by the Supreme Court, and the said cause remanded with directions to this court to take such further proceedings in said case as right and

justice and the laws of the United States direct; in accordance with the opinion of the said Supreme Court, and the court being of the opinion from an inspection of the whole record that the plaintiff, the said Third National Bank of Chattanooga, is entitled to recover from the said defendant E. C. Gordon, principal, and said defendants, C. C. Harris and Milton Humes, sureties on his supersedeas bond, said judgment, and interest thereon and all the costs.

It is therefore ordered, adjudged, and decreed, that the plaintiff, The Third National Bank of Chattanooga, recover of said defendants, E. C. Gordon, principal, and C. C. Harris and Milton Humes, sureties, the sum of seven thousand two hundred and four and $\frac{85}{100}$ dollars, ($7,204.85,) being said judgment and the interest thereon from date rendered to this date, October 31, 1892, and the further amount of one hundred and twenty-seven dollars ($127.00), the costs herein, being in all seven thousand three hundred and thirty-one $\frac{85}{100}$ dollars ($7,331.85), for which execution will issue.

And afterwards, in open court a bill of exceptions was presented and allowed. Said bill of exceptions being in words and figures as follows, to wit:

Bill of Exceptions.

In the Circuit Court of the United States, Northern District and Northern Division of Alabama.

THIRD NATIONAL BANK OF CHATTANOOGA
vs.
E. C. GORDON, MILTON HUMES, and C. C. HARRIS.

Be it remembered, that the motion in this case coming on to be heard at the present term of this court, and on the hearing, the court having overruled the demurrers of the defendants Milton Humes and C. C. Harris to the said motion made by the plaintiff, the said defendants Milton Humes and C. C. Harris then proposed to interpose to said motion a plea of payment, alleging that since the rendition of the original judgment payments on said judgment have been made to plaintiff to a large amount, exceeding one-half of the said judgment.

Plaintiff denied that any such payment had been made, and the court thereupon refused to permit the said plea of payment to be interposed or to hear any evidence touching such payments, and to this refusal of the court said defendants duly excepted.

The plaintiff then read in evidence the supersedeas bond executed by the defendants E. C. Gordon, as principal, and Milton Humes and C. C. Harris, as sureties, which bond is in the words and figures following, to wit:

"Know all men by these presents: That we, Eugene C. Gordon, and C. C. Harris and Milton Humes, are held and firmly bound unto the Third National Bank of Chattanooga, Tennessee, in

the full and just sum of ten thousand and five hundred
11 dollars, to be paid to the said Third National Bank, its certain attorney, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents: Sealed with our seals and dated this 14th day of April, in the year of our Lord one thousand eight hundred and eighty-eight. Whereas, lately at a regular term, in a suit depending in the circuit court of the United States for the northern division of the northern district of Alabama, between the Third National Bank of Chattanooga, Tennessee, and Eugene C. Gordon, judgment was rendered against the said Gordon, and the said Gordon having prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment aforesaid, and a citation having issued directed to the said Third National Bank, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next. Now the condition of the above obligation is such, that if the said Gordon shall prosecute his writ of error to effect and answer all damages and costs, if he fails to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

"(Signed) E. C. GORDON. [SEAL.]
"C. C. HARRIS. [SEAL.]
"MILTON HUMES. [SEAL.]

"Sealed and delivered in the presence of—
"HARRY T. TOULMIN,
"*District Judge.*"

C. C. Harris and Milton Humes, being duly sworn, depose and say, and each for himself saith, that he is worth $10,500, over and above all just debts and liabilities and exemptions.

(Signed) C. C. HARRIS.
MILTON HUMES.

Sworn to this 17th day of April, 1888, before me.

——.

Approved the within bond and sureties thereto.

(Signed) HARRY T. TOULMIN,
District Judge.

And the plaintiff then read in evidence the mandate from the Supreme Court of the United States; which mandate is in words and figures as follows, to wit:

UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the honorable the judges of the circuit court of the United States for the northern district of Alabama, Greeting:

Whereas, lately in the circuit court of the United States, for the northern district of Alabama, before you or some of you, in a cause

between The Third National Bank of Chattanooga, Tennessee, plaintiff, and E. C. Gordon, defendant, wherein the judgment of the said circuit court, entered in said cause on the 14th day of April, A. D. 1888, is in the following words, viz:

This being the day and hour to which the further trial of this cause was on yesterday continued, come again the parties, by
12 their attorneys; come again the jury who were duly elected, empaneled, and sworn herein as aforesaid, and the trial of this cause proceeds.

After having heard the evidence by the parties adduced, arguments of counsel, and charge of the court, the jury retire to their room to consider of their verdict, and afterwards return into court and render their verdict in writing, signed by their foreman, and upon their oath do say:

"We, the jury, find for the plaintiff, and assess the damages at the sum of five thousand two hundred and eighty-six and $\frac{67}{100}$ dollars.

PETER M. DOX, *Foreman.*"

It is therefore considered by the court that the plaintiff have and recover of the defendant said sum of five thousand and two hundred and eighty-six and $\frac{67}{100}$ dollars, so by the jury assessed as aforesaid, together with the costs in this behalf expended, for which let execution issue, as by the inspection of the transcript of the record of the said circuit court, which was brought into the Supreme Court of the United States by virtue of a writ of error agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and ninety-one, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be and the same is hereby confirmed with the costs and interest, until paid, at the same rate per annum that similar judgments bear in the courts of the State of Alabama; and that the said plaintiff recover against the said defendant, E. C. Gordon, for its costs herein expended, and have execution therefor.

March 21, 1892.

You, therefore, are hereby commanded that such execution and proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said writ of error, notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of said Supreme Court, the 31st day of May, in the year of our Lord one thousand eight hundred and ninety-two.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

And thereupon without any other evidence the court rendered judgment granting the said motion, and directing the issue of execution against the defendants, Milton Humes and C. C. Harris, as sureties on said bond, for the principal and interest and costs, as shown in said judgment. And to the rendition of said judgment against them, and the direction to issue execution thereon against them, said defendants, Harris and Humes, objected and excepted.

And defendants here now in open court tender this their bill of exceptions, which they pray may be signed, sealed, and
13 made part of the record in this cause, all of which is accordingly done in open court this 31st day of October, 1892.

(Signed) JOHN BRUCE, *Judge.*

Assignments of Error. Filed April 27th, 1893.

In the Circuit Court of the United States, Northern Division, Northern District of Alabama.

THIRD NATIONAL BANK OF CHATTANOOGA
vs.
EUGENE C. GORDON, MILTON HUMES, and C. C. HARRIS.

The defendants in the above-entitled cause, Eugene C. Gordon, Milton Humes and C. C. Harris, having on the 25th day of April, 1893, obtained from the Honorable Howell E. Jackson, a justice of the Supreme Court of the United States, a writ of error from the judgment heretofore rendered in said cause on the 31st day of October, 1892, returnable to the United States circuit court of appeals for the fifth circuit at New Orleans, come and file the following assignments of error:

THIRD NATIONAL BANK OF CHATTANOOGA
vs.
EUGENE C. GORDON, MILTON HUMES, and C. C. HARRIS.

1. The court erred in the judgment rendered.

2. The court erred in overruling the first ground of defendants' demurrers to said motion of plaintiff.

3. The court erred in overruling the second ground of defendants' demurrers to plaintiff's said motion.

4. The court erred in overruling the third ground of defendants' demurrers to plaintiff's said motion.

5. The court erred in not allowing defendants to file and interpose to said motion a plea alleging that since the rendition of said original judgment payments on said judgment have been made to a large amount to plaintiff, exceeding one-half of said judgment.

6. The court erred in not allowing the defendants to offer evidence showing that since the rendition of the original judgment in said cause, payments on said judgment had been made to plaintiff to a large amount, exceeding one-half of said judgment.

7. The court erred in rendering said judgment against the defendants on notice and motion, without other process or pleadings.

R. C. BRICKELL,
Attorney for Defendants.

Endorsed thereon: Filed April 27th, 1893. N. W. Trimble, clerk.

Writ of Error. Filed April 27th, 1893.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the northern division of the northern district of Alabama, Greeting:

14 Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between The Third National Bank of Chattanooga, as plaintiff, and E. C. Gordon, C. C. Harris and Milton Humes as defendants, a manifest error hath happened, to the great damage of the said E. C. Gordon, C. C. Harris and Milton Humes as by their complaint appears. We being willing that error, if any have been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinct and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the fifth circuit, together with this writ, so that you have the same at New Orleans within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said United States circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 25th day of April, in the year of our Lord one thousand eight hundred and ninety-three.

[SEAL.] N. W. TRIMBLE,
Clerk United States Circuit Court, Northern District, Northern Division of Alabama.

With sureties to be approved by the circuit judge.

Allowed to operate as a supersedeas on filing bond for $8,000, within ten days from date of allowance, April 25, 1893.

HOWELL E. JACKSON,
Justice of the Supreme Court of the United States.

Endorsed thereon: Filed April 27, 1893. N. W. Trimble, clerk.

Supersedeas Bond. Filed April 27, 1893.

Know all men by these presents, that we, E. C. Gordon, Milton Humes and C. C. Harris, as principals, and W. W. Littlejohn and

John H. Sheffey, as sureties, are held and firmly bound unto the First National Bank of Chattanooga, in the full and just sum of eight thousand dollars, to be paid to the said The Third National Bank of Chattanooga, and its certain attorney, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 27th day of April, in the year of our Lord one thousand eight hundred and ninety-three.

Whereas, lately at a regular term of the circuit court of the United States for the northern division of the northern district of Alabama, in a suit depending in said court, between the said The Third National Bank of Chattanooga and Eugene C. Gordon, Milton Humes and C. C. Harris, the principal obligors herein, a judgment was rendered against the said Gordon, Humes and Harris, and the said Gordon, Humes and Harris having obtained a writ of
15 error and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said The Third National Bank of Chattanooga, citing and admonishing it to be and appear at the United States circuit court of appeals for the fifth circuit, to be holden at New Orleans within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said Gordon, Humes and Harris shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make said plea good, then the above obligation to be void, else to remain in full force and virtue.

E. C. GORDON, [SEAL.]
By C. C. HARRIS. [SEAL.]
MILTON HUMES. [SEAL.]
W. W. LITTLEJOHN. [SEAL.]
JOHN SHEFFEY. [SEAL.]

Sealed and delivered in presence of—
—— ——.
—— ——.

Approved by—
JOHN BRUCE, *U. S. Judge.*

Before me, N. W. Trimble, clerk of the circuit court of the United States for the northern district, northern division of Alabama, personally appeared C. C. Harrjs and Milton Humes and W. W. Littlejohn, who being by me first duly sworn, says each for himself that he is worth the amount of the foregoing bond over and above legal exemptions and liabilities.

(Signed) MILTON HUMES.
C. C. HARRIS.
W. W. LITTLEJOHN.

Subscribed and sworn to before me, this 27th April, A. D. 1893.
N. W. TRIMBLE,
Clerk U. S. Circuit Court, Nor. Div., Nor. Dist. Ala.

Citation. Filed April 27, 1893.

THE UNITED STATES OF AMERICA:

To the Third National Bank of Chattanooga, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals for the fifth circuit, at New Orleans on Tuesday, the 23d day of May, 1893, next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the northern division of the northern district of Alabama, wherein E. C. Gordon, C. C. Harris and Milton Humes are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the said judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

16 Witness the Honorable Howell E. Jackson, associate justice of the Supreme Court of the United States, this 25th day of April, in the year of our Lord one thousand eight hundred and ninety-three.

(Signed) HOWELL E. JACKSON,
Associate Justice.

Endorsed thereon:

On this twenty-eighth day of April, in the year of our Lord one thousand eight hundred and ninety-three, personally appeared Robert Barber, chief deputy U. S. mar., before me, the subscriber, and makes oath that he delivered a true copy of the within citation to William Richardson, Esq., attorney for Third National Bank of Chattanooga.

ROBERT BARBER,
Chief Deputy U. S. Mar., Northern District of Alabama.

Sworn to and subscribed the 28th day of April, 1893.
N. W. TRIMBLE, *Clerk.*

UNITED STATES OF AMERICA,
Northern District of Alabama, Northern Division.

I, N. W. Trimble, clerk of the circuit court of the United States of America, in and for said division of said district, do hereby certify that the foregoing is a true, full and complete copy of the record and proceedings had in case No. 1444, Third National Bank of Chattanooga *vs.* E. C. Gordon, Milton Humes and C. C. Harris, as fully as the same does appear of record in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said court, at office, in the city of [SEAL.] Huntsville, in said district, this 6th day of May, A. D. 1893.

N. W. TRIMBLE,
Clerk of the U. S. Circuit Court.

17 *Proceedings in United States Circuit Court of Appeals for the Fifth Circuit.*

Motion to vacate supersedeas. Filed May 27, 1893.

In the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans.

C. E. GORDON, MILTON HUMES, and C. C. HARRIS, Plaintiffs in Error,
vs.
THIRD NATIONAL BANK OF CHATTANOOGA. } No. 155.

Motion to Vacate and Discharge Supersedeas.

In this case the defendant in error moves the court to discharge and vacate the order made by Justice Howell E. Jackson on the 25th of April, 1893, directing that the writ of error sued out on that date be allowed to have the effect of a supersedeas, superseding and staying the collection of the judgment sought to be reviewed, because the record shows that the judgment thus superseded and stayed was rendered and made final on the 31st day of October, 1892, by the United States circuit court at Huntsville, Alabama, and the writ of error was not sued out until the 26th day of April, 1893, and not served by lodging a copy with the clerk of the United States circuit court at Huntsville, Alabama, until the 27 day of April, 1893, more than 60 days after the rendition of the judgment thus superseded.

This May 25, 1893.

(Signed) WM. RICHARDSON &
WHITE & MARTIN,
Att'ys for Def't in Error.

18 *Notice of Motion to Vacate Supersedeas. Filed June 2, 1893.*

In the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana.

E. C. GORDON, MILTON HUMES, and *Milton Humes*, Pl'ffs in Error,
vs.
THIRD NAT'L BANK OF CHATTANOOGA.

To the plaintiffs in error, E. C. Gordon, Milton Humes, and C. C. Harris:

You and each of you are hereby notified that on the first Monday in June, 1893, at the rooms of the United States circuit court of appeals for the fifth circuit, at New Orleans, La., the undersigned defendant in error, The Third National Bank of Chattanooga, by its attorneys, will move the said United States circuit court of appeals for the fifth circuit to discharge and vacate the order made by Justice Howell E. Jackson on the 25th of April, 1893, directing that the writ of error sued out on that date operate as a supersedeas of the judgment sought to be reviewed in this case upon the plaintiffs in

error executing a bond in the sum of eight thousand dollars, thus superseding said judgment, because the said judgment thus superseded was rendered and made final on the 31st day of October, 1892, and said writ of error was not sued out until the 25th day of April, 1893, and not served by lodging a copy with the clerk of the United States circuit court at Huntsville, Ala., until the 27th day of April, 1893, more than 60 days (Sundays excluded) after the rendition of said judgment superseded.

This May 25, 1893.

THIRD NATIONAL BANK
OF CHATTANOOGA,
(Signed) By Att'y-, GEO. T. WHITE &
WILLIAM RICHARDSON.

19 *Return.*

Received in office May 25, '93.

A. R. NININGER, *U. S. M.*

Executed by serving a copy on Milton Humes in Huntsville, Ala., on May 29th, 1893.

(Signed) A. R. NININGER,
U. S. Marshal,
By JNO. F. LANIER, *Dep.*

Motion to Advance Cause on Docket. Filed June 5th, 1893.

United States Circuit Court of Appeals for Fifth Circuit Court.

E. C. GORDON, MILTON HUMES, and C. C. HARRIS
vs.
THE 3RD NATIONAL BANK OF CHATTANOOGA, TENNESSEE.

In the above-entitled cause the plaintiffs move the court to advance said cause upon the docket and hear and determine it upon the merits at the same time that the motion to vacate the supersedeas in this cause is heard, and for grounds of said motion say that on the 31st day of Oct., 1892, the plaintiffs in error, Milton Humes and C. C. Harris, sued out a writ of error to this
20 court from the same judgment and upon the same assignment of errors as the writ of error in the present cause was sued out, as will more fully appear from the record of the cause No. 88 in this court of Milton Humes and C. C. Harris *vs.* The 3rd National Bank of Chattanooga, Tennessee, which is hereby referred to and made a part of this motion. This court thereafter dismissed said writ of error so sued out by said Humes & Harris upon the ground that there was a failure to sue said writ out in the names of all parties defendant to the judgment of the court below. Thereafter the said Harris & Humes moved this court to reinstate said cause upon the docket, to rescind said order of dismissal, and for leave to amend said writ of error by making Eugene C. Gordon a plaintiff in error therein. This court refused said motion, and

thereupon, upon the intimation of this court in the opinion on the dismissal of said writ of error as to the jurisdiction of this court to try the merits of said cause, then plaintiff sued out a writ of mandamus in the Supreme Court of the United States for the purpose of requiring the said circuit court to vacate said judgment. The said Supreme Court granted a rule *nisi*, but upon the return of said circuit court in answer thereto dismissed these plaintiffs' petition and declined to grant said mandamus, because they adjudged writ of error the proper remedy. Thereupon, and on the 25th day of April, 1893, these plaintiffs sued out before the Honorable Howell E. Jackson, a justice of said Supreme Court, the present writ of error, which said writ, upon the execution of a bond in the sum of $8,000 by these plaintiffs, was, by the order of Honorable Howell E. Jackson, made a supersedeas. The record in this cause is hereby referred to and asked to be considered as part of this motion; and
21 now the said defendant in error moves to vacate said supersedeas so granted as aforesaid. Wherefore these plaintiffs in error pray that this cause be heard upon its merits with said motion to vacate in order that justice may be done in the premises.

(Signed) R. C. BRICKELL,
Att'y for Pl'ff in Error.

Order. Cause Advanced upon the Docket and Set Down for Hearing.

Extract from the Minutes, November Term, 1892.

MONDAY, *June 5th*, 1893.

Court met pursuant to adjournment.

Present and presiding the Honorable Don A. Pardee, United States circuit judge for the fifth judicial circuit.

Present also the Honorable A. B. McCormick, United States circuit judge for the fifth judicial circuit, and the Honorable James W. Locke, United States district judge for the southern district of Florida.

E. C. GORDON *et al.*
v.
THIRD NATIONAL BANK OF CHATTANOOGA.

This day was presented to the court the motion of the defendant in error to discharge the supersedeas in this cause, and also the motion of the plaintiffs in error to advance this cause upon the docket; upon consideration whereof, it is ordered that this cause be advanced upon the docket, and this cause, together with the motion of the defendant in error, set down for hearing on Tuesday, the 20th day of June instant.

22 *Submission of Motion to Discharge Supersedeas, &c.*

Extract from the Minutes, November Term, 1892.

WEDNESDAY, *June* 21, 1893.

Court met pursuant to adjournment.

Present and presiding the Honorable Don A. Pardee, United States circuit judge for the fifth judicial circuit.

Present also the Honorable A. P. McCormick, United States circuit judge for the fifth judicial circuit, and the Honorable James W. Locke, United States district judge for the southern district of Florida.

E. C. GORDON *et al.*
v.
THIRD NATIONAL BANK OF CHATTANOOGA. } No. 155.

This day came on to be heard *this day*, on the motion to discharge the supersedeas herein, and on the merits and after argument by Mr. Wm. Grant and Mr. Jno. H. Sheffey, for plaintiffs in error, and by Mr. Geo. T. White, for defendant in error, was submitted to the court on the briefs of counsel.

Final Judgment.

Extract from the Minutes, November Term, 1892.

TUESDAY, *June* 27, 1893.

Court met pursuant to adjournment.

Present and presiding the Honorable Don A. Pardee,
23 United States circuit judge for the fifth judicial circuit.

Present, also, the Honorable A. P. McCormick, United States circuit judge for the fifth judicial circuit, and the Honorable James W. Locke, United States district judge for the southern district of Florida.

E. C. GORDON, MILTON HUMES, and C. C. HARRIS
v.
THE THIRD NATIONAL BANK OF CHATTANOOGA. } No. 155.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the northern district of Texas and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed except as to so much of said judgment as compounds the interest, and that the said circuit court order execution against the plaintiffs in error, in accordance with the directions contained in the opinion of this court rendered in this cause.

It is further ordered and adjudged that the defendant in error, The Third National Bank of Chattanooga, be condemned to pay the costs of this cause in this court, for which execution may be issued out of said circuit court.

24 *Petition for Writ of Error. Filed July* 18, 1893.

United States Circuit Court of Appeals for the Fifth Circuit.

E. C. GORDON, MILTON HUMES, and C. C. HARRIS, Plaintiffs in Error,
v.
THE THIRD NATIONAL BANK OF CHATTANOOGA, Defendant in Error. } No. 155.

To the honorable the judges of the Supreme Court of the United States:

The petition of Milton Humes and C. C. Harris, plaintiffs in error in the above-entitled cause, respectively represents that there is error in the final judgment entered against them in said cause on the 27th day of June, 1893, to their prejudice, which they desire to have corrected; that the original jurisdiction of the circuit court of the United States of the northern division of the northern district of Alabama depended on the fact that they signed the supersedeas bond as sureties, given upon the allowance of a writ of error from the Supreme Court of the United States and not entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States, as will appear from the record of the cause.

Wherefore these petitioners, upon the assignment of errors hereto annexed, pray your honors or all of your honors to allow
25 them a writ of error in due form, directing said United States circuit court of appeals for the fifth circuit to send the record and proceedings aforesaid to the Supreme Court of the United States, to the end that said errors may be corrected; that a proper bond for supersedeas may be approved and citation be signed, returnable according to law; and they pray for all general relief in the premises.

(Signed) MILTON HUMES,
Att'y for Petitioners.

26 I, E. C. Gordon, one of the plaintiffs in error in the cause in which the foregoing petition is entitled, being advised that Milton Humes and C. C. Harris propose to apply for a writ of error in said cause, and having been requested to join them therein, do hereby refuse to join in said writ and application.

(Signed) E. C. GORDON.

UNITED STATES OF AMERICA, }
State of Alabama. }

E. C. Gordon, being duly sworn, says that he is the E. C. Gordon who signed the foregoing writing, and that he does not wish to retract the same.

[SEAL.] (Signed) JOHN T. BANKS,
Notary Public & ex Officio Justice of the Peace.

Order Allowing Writ of Error. Filed July 18, 1893.

JULY 12, 1893.

Let the writ of error be issued as prayed and be made a supersedeas upon plaintiffs in error giving bond in the penal sum of fourteen thousand dollars, conditioned according to law, and approved by either of the circuit judges of the fifth circuit.

(Signed) MELVILLE W. FULLER,
Chief Justice of the United States.

27 *Assignment of Errors. Filed July* 18, 1893.

United States Circuit Court of Appeals for the Fifth Circuit.

E. C. GORDON, MILTON HUMES, and C. C. HARRIS, Plaintiffs in Error,
v.
THE THIRD NATIONAL BANK OF CHATTANOOGA, Defendant in Error. } No. 155.

Assignment of errors.

1st. The United States circuit court of appeals for the fifth circuit erred in holding that the circuit court of the United States for the northern division of the northern district of Alabama had jurisdiction of the cause, it not appearing that the defendants Milton Humes and C. C. Harris were aliens or citizens other than that of the State of Tennessee, of which State the Third National Bank of Chattanooga was a citizen.

2nd. Said United States circuit court of appeals erred in holding that said circuit court of the United States for the northern district of Alabama had jurisdiction to proceed by motion against them and to render judgment therein against them without other process in due course of law.

3rd. The said United States circuit court of appeals erred in holding that said motion on which judgment was rendered against them was due process for that purpose.

28 4th. The said United States circuit court of appeals erred in holding that the demurrer of the said Milton Humes and C. C. Harris to said motion was properly overruled by the said circuit court for the northern district of Alabama.

5th. The said circuit court for the northern division of the northern district of Alabama erred in overruling said demurrer and in rendering judgment against these plaintiffs in error, and the said United States circuit court of appeals erred in affirming such ruling.

6th. The said circuit court of the United States for the northern division of the northern district of Alabama erred in refusing to allow these plaintiffs in error to file their plea of payment and to offer evidence in support thereof, and the United States circuit court of appeals erred in affirming said ruling.

7th. The United States circuit court of appeals erred in affirming the judgment of the said circuit court of the United States for the northern division of the northern district of Alabama.

(Signed) MILTON HUMES,
Att'y for Pl'ffs in Error.

29 *Writ of Error Bond. Filed July* 31, 1893.

Know all men by these presents that we, Milton Humes & C. C. Harris, as principals, and John H. Sheffey & W. W. Littlejohn, as sureties, are held and firmly bound unto the Third National Bank of Chattanooga in the full and just sum of fourteen thousand dollars, to be paid to the said Third National Bank of Chattanooga, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, jointly and severally, by these presents.

Sealed with our seals and dated this July 19th, in the year of our Lord one thousand eight hundred and ninety-three.

Whereas lately, at a term of the United States circuit court of appeals for the fifth circuit, holding sessions in and for the said circuit, in a suit depending in said circuit court of appeals, wherein E. C. Gordon, Milton Humes, & C. C. Harris were plaintiffs in error and The Third National Bank of Chattanooga was defendant in error, judgment was rendered against said E. C. Gordon, Milton Humes, and C. C. Harris, plaintiffs in error, and the said Milton Humes & C. C. Harris having obtained a writ of error and filed a copy thereof in the clerk's office of the said circuit court of appeals to reverse the judgment in the aforesaid suit, and a citation directed to the said Third National Bank of Chattanooga, defendant in error, citing and admonishing it to be and appear at the Supreme Court of the United States, to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Milton Humes & C. C. Harris shall prosecute said writ to effect and answer all damages and cost if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) MILTON HUMES. [L. S.]
JOHN H. SHEFFEY. [L. S.]
C. C. HARRIS. [L. S.]
W. W. LITTLEJOHN. [L. S.]

Bond accepted.
July 26th, 1893.
(Signed) DON A. PARDEE,
Circuit Judge.

30 UNITED STATES OF AMERICA, }
Northern District of Alabama, } ss:

Personally appeared C. C. Harris, who, being duly sworn, deposes and says that he resides in Decatur, Morgan county, Alabama, and

is worth the full sum of fourteen thousand dollars over and above all his debts and liabilities and property exempt from execution.
(Signed) C. C. HARRIS.

Subscribed and sworn before me this 21st day of July, 1893.
[SEAL.] (Signed) C. C. SHEATS,
Commissioner U. S. Circuit Court, Northern District of Ala.

UNITED STATES OF AMERICA,
Northern District of Alabama.

Personally appeared Milton Humes, who, being duly sworn, deposes and says that he is one of the principals on the within bond; that he resides at Huntsville, Alabama, and is worth the full sum of fourteen thousand dollars over and above all his debts and liabilities and property exempt from execution.
(Signed) MILTON HUMES.

Subscribed and sworn to before me this 19th day of July, 1893.
[SEAL.] (Signed) ED. GREENLEAF.
U. S. Com'r.

31 *Opinion.*

United States Circuit Court of Appeals, Fifth Circuit, November Term, 1892.

E. C. GORDON, MILTON HUMES, and C. C. HARRIS, Plaintiffs in Error,
v.
THE THIRD NATIONAL BANK OF CHATTANOOGA, TENNESSEE, Defendant in Error.
} No. 155.

Error to the circuit court of the United States for the northern district of Alabama.

Before Pardee and McCormick, circuit judges, and Locke, district judge.

MCCORMICK, *Circuit Judge*, delivered the opinion of the court:

September 19, 1892, the defendant in error filed in the office of the clerk of the United States circuit court for the northern district of Alabama its motion as follows:

"Comes The Third National Bank of Chattanooga, the plaintiff in the above-entitled cause, and shows to his honorable court that E. C. Gordon, the defendant, prayed and obtained a writ of error from the judgment and proceedings had in this court touching said cause to the honorable Supreme Court of the United States; all of which fully appears from the records of this court.

That the defendant, the said E. C. Gordon, together with C. C. Harris and Milton Humes, did on the 17th day of April, 1888, execute an appeal bond, in manner and form as required by law in

such cases, in the full and just sum of ten thousand five hun-
32 dred dollars, payable to the Third National Bank of Chatta-
nooga, Tennessee, etc.; that said bond, together with the sureties thereto, was approved by Honorable Harry T. Toulmin, district judge. Said bond is referred to and made a part of this application.

Petitioner further shows unto your honor that said writ of error in the above-entitled cause has been duly considered, passed on, and in all things determined and affirmed by the honorable Supreme Court of the United States, as is shown by the mandate of said Supreme Court, which was filed in this court on the 6th day of June, 1892, and recorded in Minute Book I, page 421, and is here now presented to this honorable court as a part of this application.

Petitioner prays that, in accordance with the judgment and mandate of the honorable Supreme Court of the United States, that this court order an execution, in manner and form as required by law, to issue against the property, goods, and effects of E. C. Gordon, C. C. Harris, and Milton Humes for the amount of said judgment, to wit, five thousand two hundred and eighty-six dollars and sixty-seven cents, with costs and interest from the date of rendition of said judgment in this court, to wit, the 14th day of April, 1888, together with all the damages allowed on such judgments under the laws of the State of Alabama.

And that notice of this application be given to E. C. Gordon, C. C. Harris, and Milton Humes to show cause, if any they have, why the prayer of this petition shall not be granted."

Service of this motion was duly made on all the plaintiffs in error, and 12th October, 1892, demurrers were filed as follows:

"Comes the defendants, C. C. Harris and Milton Humes, by attorney, and demur to the notice and motion filed against them by the plaintiff, and for cause of demurrer assign:

1. That this court is without jurisdiction to order the issue of an execution against these defendants as prayed for in said motion or petition.

2. That the said motion or petition does not make a case of which this court can take cognizance.

3. That the statutes of the State of Alabama allowing damages on judgment affirmed on writ of error or appeal are not applicable to judgments affirmed by the Supreme Court of the United States.

Wherefore defendants pray the judgment of this court whether they shall make further or other answer."

October 31, 1892, these demurrers were overruled, and there-
upon Milton Humes and C. C. Harris, plaintiffs in error,
33 proposed to interpose to said motion a plea of payment in which they would allege that since the rendition of the original judgment payments on said judgment have been made to plaintiff to a large amount, exceeding one-half of said judgment. Plaintiff denied that any such payment had been made, and the court thereupon refused to permit said plea of payment to be interposed or to hear any evidence touching said payments. It clearly appears from the bill of exceptions and the statements of respective

counsel on the oral argument in this court that no plea of payment was in fact submitted or even prepared, and that what actually occurred was a mere colloquium, in which counsel for said plaintiffs in error orally stated what they wished to plead, and counsel for the defendant in error orally said that no payment had been made, and the judge said the proposed plea and proof could not be entertained, and the counsel for said plaintiffs in error announced that they excepted to the views expressed by the presiding judge, but submitted no plea nor offered any proof. Thereupon, on the record in the cause, including the supersedeas bond and the mandate of the Supreme Court, which was in the customary form, and without other evidence, the circuit court "ordered, adjudged, and decreed that the plaintiff, The Third National Bank of Chattanooga, recover of said defendants, E. C. Gordon, principal, and C. C. Harris and Milton Humes, sureties, the sum of seven thousand two hundred and four and $\frac{85}{100}$ dollars ($7,204.85), being said judgment and the interest thereon from date rendered to this date, October 31, 1892, and the further amount of one hundred and twenty-
34 seven dollars ($127.00), the cost herein, being in all seven thousand three hundred and thirty-one $\frac{85}{100}$ dollars ($7,331.85), for which execution will issue."

To reverse which judgment this writ of error was sued out. The errors assigned are:

"1. The court erred in the judgment rendered.

2. The court erred in overruling the first ground of defendants' demurrers to said motion of plaintiff.

3. The court erred in overruling the second ground of defendants' demurrers to plaintiff's said motion.

4. The court erred in overruling the third ground of defendants' demurrers to plaintiff's said motion.

5. The court erred in not allowing defendants to file and interpose to said motion a plea alleging that since the rendition of said original judgment payments on said judgment have been made to a large amount to plaintiff, exceeding one-half of said judgment.

6. The court erred in not allowing the defendants to offer evidence showing that since the rendition of the original judgment in said cause payments on said judgment had been made to plaintiff to a large amount, exceeding one-half of said judgment.

7. The court erred in rendering said judgment against the defendants on notice and motion without other process or pleadings."

It will be more convenient and probably as satisfactory to treat these seven assignments as embraced in the first and address what we deem it incumbent on us to say to the whole case made by the record. The rule is universal that the affirmance of the judgment in the appellate court fixes the liability of the sureties on a supersedeas writ of error bond, as it shows conclusively that the principal obligor did not prosecute his appeal to effect. Nothing will discharge the sureties on such a bond but the reversal of the judgment or its satisfaction. It is therefore not insisted that the sureties' liability is not fixed by the affirmance. The contention is as to the

lawful method and correct practice to enforce that liability in
35 this case. In Babitt *v.* Finn, from which, with very slight modification, the foregoing suggestions have been drawn, it is further said: "As between the obligors and obligees all the obligors are principal debtors, though as between each other they have the rights and remedies resulting from the relation of principal and surety. When they execute the bond they assume the obligation that they will answer all damages and costs if the principal fails to prosecute his appeal to effect and make his plea good, from which it follows that if the judgment is affirmed by the appellate court, either directly or by a mandate sent down to the subordinate court, the sureties *proprio vigore* become liable to the same extent as the principal obligor."

In Blossom *v.* Railroad Company Judge Miller, in illustrating the matter he was therein discussing, said: "Sureties, signing appeal bonds, stay bonds, delivery bonds, and receipters under writs of attachment, become quasi-parties to the proceedings and subject themselves to the jurisdiction of the court, so that summary judgments may be rendered on their bonds or recognizances." This language of the eminent judge, in the connection and with the purpose used, implies that the practice indicated is now general and well settled. Such was not the ancient course of the common law, for then, upon affirmance of the judgment the obligee in the supersedeas bond might bring his action of debt on the bond or proceed by *scire facias*, at his election.

In this connection it may be well to notice that the motion for judgment in this case has all the necessary elements of a
36 *scire facias*, and proper notice thereof having been served on all of the obligors in the bond and they having all appeared and the sureties having interposed demurrers, not well taken, considering it as a *scire facias*, and having failed to plead or answer, the court could well proceed to enter judgment on the record alone without other proof.

Dismissing this view of the case, however, and considering it, as the parties and the circuit court appear to have treated it, as a proceeding authorized by the statute laws of Alabama and the practice of the United States circuit courts for that State and of United States courts in general, was the proceeding in accordance with law?

The United States statutes and the Supreme Court rule alike require that sureties on a supersedeas bond shall bind themselves to answer all damages and costs if their principal shall fail to prosecute his writ of error or appeal to effect. This is no new rescript, for so aforetime was the law. In neither of these can we find a "thus it is written," from which it follows that, if the judgment is affirmed by the appellate court, either directly or by a mandate sent down to the subordinate court, the sureties *proprio vigore* become liable to the same extent as the principal obligor, and become quasi parties to the proceedings and subject themselves to the jurisdiction of the court, so that summary judgments may be rendered on their bonds. This language then of that

most eminent court from which it is taken must find its support in that "use and wont" which has crystallized into a settled and general practice or in the statutes and practice of the
37 courts of the various States in which the United States subordinate courts are held. It is matter of public, political, and judicial history that in the beginning of our dual system of government much jealousy existed and doubt was indulged and suggested as to the jurisdiction and powers of the national courts. The undisciplined ranks of the legal profession and many trial judges in the first years of their service laid painful stress on a popular proposition that the national courts, if they could suffer themselves to refer to the United States as a nation, were all courts of limited jurisdiction and must keep within the literal grant of their constitution and ordination. The veterans at the bar and on the bench and the highest courts took deeper soundings in the well of legal lore and early and uniformly held as occasion arose that where the state of the parties or the subject-matter brought the case or question within the jurisdiction of the national courts those tribunals were no more fettered by "thus only is it written" than any courts of general jurisdiction, but, like all other courts, were clothed with the power and charged with the duty of giving such rational construction to State and national statutes and such practical application of the rules of pleading, practice, and procedure as would meet the varying features and growing volume of questions springing out of advancing business and social life. In no system of civilization that has ever existed since the day of "man's first disobedience and his fall" could all these cases be anticipated. The judiciary is constituted to meet them. In free countries it
38 keeps itself in line with organic principles, legislative beacons and precedents, all of which it must construe. In this sense even the country of the most strictly limited constitution and government must have much of what is often disparagingly called judge-made law, for the judges are charged to declare what the written law imports and to fix and observe correct rules of practice consistent with their construction of the written law and to apply the same to cases as these arise.

In Alabama the statute, which has now been in force more than forty years, after providing, in cases for the recovery of money only, that to secure a supersedeas on appeal the appellant or some other person shall give bond in double the amount of the judgment conditioned to prosecute the appeal to effect and if he fails therein to satisfy such judgment as the supreme court may render in the premises, further provides: "If the supreme court affirms the judgment of the court below it must render judgment against all or any of the obligators in the bond for the amount of the judgment affirmed, ten per cent. damages thereon, and the costs of the supreme court." No further action need be taken, possibly no further action can be taken, in that case in the State circuit court. There can be no question that if this litigation had been in the State courts of Alabama the defendant in error here would have been entitled to its judgment against all the obligors in the supersedeas

bond on the affirmance of the judgment below and would have had such judgment in the supreme court. The statute of Ala-
39 bama cannot by its own force control the practice of the supreme court or other courts of the United States, and it is not the practice of the Supreme Court of the United States on affirmance of the judgment of a subordinate court to make the judgment of that court the judgment of the Supreme Court, to be directly executed as such. In lieu thereof its mandate issues to the court *a quo*, commanding "that such execution and proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding."

In substantially similar conditions on such a mandate judgment is entered against stipulators—principal and sureties—in admiralty. Surely, according to right and justice, such judgment ought to be had not merely for convenience, as has been suggested, but to award bare justice to the party whose right to execution has been suspended by the sureties on the bond. Does any law of the United States forbid? If its express letter is wanting, do not all the analogies of the law of the United States and the logic of the situation require that the defendant in error should have its judgment on the mandate and on the supersedeas bond against all the obligors in the bond? The jealousy and doubt and the tendency to limit by the letter the jurisdiction of the subordinate courts of the United States and the hesitation or neglect of some of those courts to give a sound construction to conformity statutes theretofore passed is plainly rebuked with marked emphasis in the conformity statutes passed in 1872 and now embodied in section 914 of the Revised Statutes, so often quoted here and in the trial courts. It will
40 be observed that this much-quoted section does not so much authorize the conformity it mentions as it requires it with earnest emphasis, "any rule of court to the contrary notwithstanding." The conformity is required to be not as near as may be possible or as near as may be practicable, but only as near as may be, devolving upon the judge to be affected by it the duty of construing and deciding its sound application.

We have examined with care the Alabama cases cited and relied on by the plaintiffs in error, but find nothing in them to support the contention of plaintiffs in error. Of course, the language quoted in the brief of counsel is found in the opinion of the court, but it has relation to a different kind of supersedeas bond taken under another section of the Alabama code, materially different from the section applicable to this case, and in reference to which the bond in this case was manifestly taken and approved by the distinguished judge of the southern district of Alabama, so long the judge of one of the State circuit courts of that State and entirely familiar with her laws.

We do not have ready access here to the statutes and reports of all the States, but as far as we are able to ascertain there is provision made in all the States for rendering summary judgment against all the obligors in supersedeas bonds when the judgment super-

seded is affirmed, and we do not find in reason or in the authorities of text-writers or of adjudged cases or in the statute law of Alabama or of the United States ground for refusing the defend-
41 ant in error an order for execution in its favor against all of the plaintiffs in error for the amount of five thousand two hundred and eighty-six dollars and sixty-seven cents and costs in the circuit court, with interest from the date of the original judgment until paid, at the same rate per annum that similar judgments bear in the courts of the State of Alabama, and the costs of the supreme court with like interest thereon from the date of the judgment of affirmance until paid.

The order of the circuit court from which this writ of error is taken added in the interest from the date of the original judgment to the date of the order for execution and gave judgment and ordered execution for this new sum. In that respect said order of the circuit court goes beyond the mandate of the supreme court and the correct practice in such cases and is to that extent erroneous. In that respect and to that extent only said order must be reversed, with directions to the circuit court to order execution in the manner and to the extent above indicated.

Appended to this opinion is a list of some of the authorities we have examined and considered in connection with this case and which are here referred to as supporting or illustrating the views we have expressed and the conclusion we have reached.

It is therefore ordered that the judgment of the circuit court be affirmed except as to the compounding of the interest, and that the circuit court order execution against the parties in accordance with the directions in the foregoing opinion, and that defendant in error pay the costs of this court herein.

42 Babbitt *v.* Finn, 101 U. S., 7.
Blossom *v.* Railroad Co., 68 U. S., 655.
Tidd's Practice, chapters 43 and 44.
U. S. Rev. Statutes, secs. 716, 914, and 1000.
Supreme Court rule 29.
Code of Alabama, 1886, secs. 3623 and 3661.
Railroad Co. *v.* Horst, 93 U. S., 291.
Nudd *v.* Burross, 91 U. S., 426.
Beall *v.* New Mexico, 83 U. S., 535.
Smith *v.* Gaines, 93 U. S., 341.
Gwin *v.* Breedlove, 43 U. S., 29.
Ames *v.* Smith, 41 U. S., 301.
Crawford *v.* Kirksey, 55 Ala., 291.
Hughs *v.* Hatchett, 55 Ala., 546.

43 United States Circuit Court of Appeals for the Fifth Circuit.

I, James M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing forty-two pages, numbered from 1 to 42, inclusive, contain a true copy of the record, pleas, process, and all proceedings in the case of E. C. Gordon, Milton Humes, and C. C. Harris, plaintiffs in error,

vs. The Third National Bank of Chattanooga, defendant in error, No. 155, November term, 1892, as the same remains upon the files and records of said United States circuit court of appeals.

Seal United States Circuit Court of Appeals, Fifth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 5th day of August, A. D. 1893.

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

44 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of appeals for the fifth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals, before you or some of you, between E. C. Gordon, Milton Humes, and C. C. Harris and the Third National Bank of Chattanooga, Tennessee, a manifest error hath happened, to the great damage of the said Milton Humes and C. C. Harris, impleaded with said E. C. Gordon, and authorized, by reason of the refusal of said Gordon to join in this writ, to prosecute the same themselves, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Supreme Court of the United States.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 12th day of July, in the year of our Lord one thousand eight hundred and ninety-three.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
MELVILLE W. FULLER,
Chief Justice of the United States.

45 UNITED STATES OF AMERICA, *ss:*

To The Third National Bank of Chattanooga, Tennessee, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days

from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of appeals for the fifth circuit, wherein Milton Humes and C. C. Harris, impleaded with E. C. Gordon, are plaintiffs in error and The Third National Bank of Chattanooga, Tennessee, is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 12th day of July, in the year of our Lord one thousand eight hundred and ninety-three.

MELVILLE W. FULLER,
Chief Justice of the United States.

Service of copy of this citation is hereby acknowledged on this the 17th day of July, 1893.

WILLIAM RICHARDSON,
Of Counsel for 3rd Nat'n'l Bank, Chattanooga, Tenn.

Endorsed on cover: Case No. 15,374. U. S. circuit court of appeals, 5th circuit. Term No., 990. Milton Humes and C. C. Harris, plaintiffs in error, *vs.* The Third National Bank of Chattanooga, Tennessee. Filed August 11th, 1893.

[redacted]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. [redacted]

MILTON HOMES AND C. C. HARRIS, PLAINTIFFS IN ERROR.

vs.

THE THIRD NATIONAL BANK OF CHATTANOOGA, TENNESSEE.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

WM. RICHARDSON,
W. H. REGAR,
FRANCIS MARTIN,
GEO. T. WHITE,
Attorneys for Defendant in Error.

[redacted]

IN THE UNITED STATES SUPREME COURT.

MILTON HUMES AND C. C. HARRIS,

PLAINTIFFS IN ERROR

vs.

THIRD NATIONAL BANK OF CHATTANOOGA.

BRIEF FOR DEFENDANT IN ERROR ON MOTION TO DISMISS AND AFFIRM.

STATEMENT OF THE CASE.

On the 16th of February, 1888, the defendant in error brought suit in the United States Circuit Court. at Huntsville, Ala., against E. C. Gordon, the maker, to collect two unsecured promissory notes.

A judgment was recovered against Gordon on these notes in 1888, and the case brought to this Court on writ of error, Humes and Harris, the plaintiffs in error, becoming Gordon's securities on his supercedeas bond.

The judgment of the Circuit Court was affirmed by this Court, and a mandate issued to the Circuit Court in the usual form. The jurisdiction of the Federal Court in these proceedings depended upon diverse citizenship alone. And in fact, one of the principal errors relied on to reverse was the fact that jurisdiction depended solely on diverse citizenship, and it was claimed the record did not legally show that fact.

These facts appear from the records of this Court, and are embodied in the opinion of the Court in this case.

See Gordon vs. Third National Bank, 144 U. S. 97.

When the mandate of this Court reached the Circuit Court, the defendant in error, pursuant to the practice of Federal Courts in Alabama under the statutes of that state, upon petition and notice in the *original case*, obtained a judgment for the amount of defendant's debt against the principal, Gordon, and plaintiffs in error, Humes and Harris as sureties on the supercedeas bond. The opinion of Judge Bruce is copied in the Record, page 6, and reported in 53 Fed. Rep., page 471.

Plaintiffs in error, Humes and Harris, sued out a writ of error in the Circuit Court of Appeals, for the purpose of reviewing and reversing this judgment. This writ of error was dismissed because Gordon did not join, and there was no severance. The opinion of the Circuit Court of Appeals dismissing the writ of error is reported in case of

Humes, et al vs. Third National Bank, 54 Fed. Rep., p. 917.

S. C. 4 Cir. Ct. of Appeals, 668.
See Record page 18.

Thereupon the plaintiffs in error undertook, by mandamus proceedings in this Court, to review and reverse the judgment of the Circuit Court upon the supercedeas bond. The petition for mandamus was dismissed. The opinion of this Court dismissing the petition for mandamus is reported in

In re Humes, 149 U. S., p. 192.

Plaintiffs in error *and Gordon* then sued out a second writ of error and supercedeas in the Circuit Court of Appeals for the Fifth Circuit, and sought in that Court to reverse the judgment rendered on the supercedeas bond.

The case was heard upon its merits, and the judgment of the Circuit Court affirmed.

The opinion of the Circuit Court of Appeals is copied into the Record, page 24, and also reported in 56 Fed. Rep., p. 790.

Gordon declining to join therein, plaintiffs Humes and Harris alone have sued out a writ of error in this Court, and brought the judgment of the Circuit Court of Appeals to this court for review.

Thus it will be seen that this case has been brought to this

Court three times, and carried to the Circuit Court of Appeals twice.

The defendant in error now moves to dismiss this last writ of error because this court is without jurisdiction, and couples therewith a motion to affirm, under Rule six of this Court.

The writ of error is sued out and sought to be maintained under Section six of the judiciary act of Congress of May 3, 1891, establishing the United States Circuit Courts of Appeals.

It is sought to give this Court jurisdiction upon the ground (as stated in the petition for the writ) that the original jurisdiction of the United States Circuit Court did not depend alone upon diverse citizenship of the parties, but upon the fact that the suit was based upon a supercedeas bond which plaintiffs in error had executed as the sureties of E. C. Gordon upon the allowance of a writ of error from this Court sued out in this case.

ARGUMENT.

I.

It has long been well settled that the appellate jurisdiction of this Court exists only as provided by the Acts of Congress upon that subject.

The judiciary Act of Congress of May 3, 1891, establishing the Circuit Courts of Appeals, defines, fixes and distributes the appellate jurisdiction of this Court and the Circuit Courts of Appeals.

Section Six of the Act provides that the judgment of the Circuit Courts of Appeals shall be final *in all* cases in which the jurisdiction depends entirely upon diverse citizenship; or when the suit is between aliens and citizens; or under the patent laws; the revenue laws; and the criminal laws; unless the Circuit Court of Appeals certify the case to the Supreme Court for instructions.

In cases where the jurisdiction depends upon other facts, a writ of error lies from this Court to the Circuit Courts of Appeals, as a matter of right.

Sec. 6, Act of Congress, 26 Stat., at L. 826.

Therefore in order to sustain the jurisdiction of this Court, the plaintiffs in error must point out in the Record some juris-

dictional fact that gave the Federal Circuit Court jurisdiction other than diverse citizenship, and other than the other jurisdictional facts set forth in the first clause of Sec. 6 of the Act in which the judgments of the Circuit Courts of Appeals are made final. We think the court will search the Record in vain for any jurisdictional fact except the diverse citizenship of the parties in the beginning of this suit.

It is suggested, and urged in the petition for writ of error, that the jurisdiction did not depend solely on the diverse citizenship of the parties—thereby admitting that as one ground of jurisdiction—but also upon the fact that the suit was based on a supercedeas bond, executed upon the allowance of a writ of error by this Court. But, if the petition could be looked to as a part of the record, it is submitted that, that is not a jurisdictional fact. A supercedeas bond is such a common law obligation that it might be sued on any where, and in any court, and there is nothing connected with it that would enable the obligee to maintain an original suit on it in the Federal Court solely by reason of it being a supercedeas bond given in the progress of legal proceedings conducted in a Federal Court. If the sureties had become citizens of Tennessee, in which State the Bank has its *situs*, making it necessary to bring an original suit on the supercedeas bond, could the suit have been maintained in the Federal Court solely because based upon the supercedeas bond? Most certainly not.

The plaintiffs in error having invoked the aid of this Court by suing out the writ of error, the burden is on them to show in the record some Federal question, some jurisdictional fact involved, that gives this court jurisdiction under the Acts of Congress. Its jurisdiction is not general, but must come within an enactment of Congress.

II.

It may be argued, that unless the fact that the suit was a proceeding on a supercedeas bond, gave the Circuit Court jurisdiction it is without jurisdiction. We do not admit such to be the case; but if it was, it is now too late to raise the question

of jurisdiction of the Circuit court, or at least it cannot be raised upon this writ of error.

If the plaintiffs in error wished to raise the question of jurisdiction, they should have taken the case directly to this court under section five of the Judiciary Act of 1891, upon the question of jurisdiction alone; or having carried the case to the Circuit Court of Appeals, procured that Court to certify the question of jurisdiction to this court under section six of said Act. They can only now raise the question of jurisdiction in that way. Taking the case to the Circuit Court of Appeals upon writ of error is a waiver of the question of jurisdiction, except as it might be certified by the Circuit Court of Appeals.

McLish vs. Roff, 141 U. S., 661—668.

III.

The theory of the defendant in error in this case is this: In the State of Alabama by reason of statutes regulating the mode of proceeding on supercedeas bonds which statutes by the process Acts of Congress have been adopted and made a part of the practice and mode of proceeding in the Federal Courts in that state; and for reasons set forth in the opinions of the Circuit Court and Circuit Court of Appeals, in this case; it is not necessary in Alabama to bring an original suit upon a supercedeas bond, but the same may be proceeded on in a summary way by petition, notice and motion in the case wherein the bond was given as we have done in this case. And that a proceeding of that character is but an incident to and a continuance of the original case—a mere additional step—all such proceedings relating back to, and being based upon the jurisdictionl facts set forth in the beginning of the suit, as in the cases of

Gwin vs. Breedlove, 2 Howard, 29.
Blossom vs. R. R. Co., 68 U. S. (1 Wall.) 655.

Certain it is that the proceedings which were had on this supercedeas bond, as conducted, and sustained by the Circuit Court, and Circuit Court of Appeals, is not an original suit but an incident to and a continuation of, the original suit, and no more. Diverse citizenship alone gave jurisdiction in the beginning of that case.

Gordon vs. Third National Bank, 144 U. S., 97.

There is no jurisdictional fact in this record except diverse citizenship. If the record does not show diverse citizenship, it shows no jurisdictional fact at all. Certain it is that the only jurisdictional fact shown in the beginning of the suit was diverse citizenship. Now, if other questions have arisen, or been injected into the suit since it began which might have been set up as jurisdictional facts in the beginning of the suit, and sustained juri-diction within themselves, independent of diverse citizenship, but which were not set up in the inception of the suit, such facts cannot now be urged to give this Court jurisdiction.

The appellate jurisdiction of this Court under section 6 of the Judiciary Act of 1891 will be controlled by the jurisdictional facts set forth in the beginning of the original suit, and not what developed in its progress, even though the subsequently developed jurisdictional facts may be set up by plea or answer by way of defense.

Metcalf vs. Watertown, 128 U. S., 586.
Colorado Cent. Mining Co., vs. Turck, 150 U. S., 138.

The jurisdiction of the original suit depended wholly on diverse citizenship, and the proceedings on the supercedeas bond, whether right or wrong, being had in the original case, and being no more than further proceedings in the original case, even if the supercedeas bond would of itself give the Federal Court jurisdiction, it was not the original jurisdictional fact upon which the suit was brought in the Circuit Court, and therefore would not give this Court jurisdiction.

150 U. S., 138.

IV.

The object of the judiciary Act of 1891 was to relieve this Court from the over-crowded condition of its docket. In all of the constructions given it, by this Court, that end has been kept constantly in view. It has been held that only questions of grave importance should be certified by the Circuit Courts of Appeals. Nor will this Court issue a writ of *Certiorari* under the Act, unless the question involved is of importance and mo-

ment. Many petitions for Certiorari have been presented but few granted.

Lau Ow Bew, Petitioner, 141 U. S., 583.
In re Woods, Petitioner, 143 U. S., 202.
Lau Ow Bew vs. U. S., 144 U. S., 47.
Am. Construction Co., vs. Jacksonville R. R., 148 U. S., 372.
Cary vs. Houston & Texas C. R. R., 150 U. S., 170.

The Act has under all circumstances received a strict construction. Most of the cases certified by the Circuit Courts of Appeals under the Act have been dismissed.

Columbus Watch Co., vs. Roberts, 148, U. S., 266.
Cin. Ham. & D. R. R., vs. McKeen, 149 U. S., 259.

The question in this case is one of no great importance or general interest. It is not whether plaintiffs in error are liable, but how to enforce that liability. It is purely a question of practice—a mode of proceeding upon a supercedeas bond—depending upon local statutes, and confined to the State of Alabama. It is not such a case as this Court would in the exercise of the discretion given under the Statute feel called upon to draw to itself by reason of its magnitude or public importance. This question of practice has been passed upon by two Courts, familiar with the Statutes and practice in the State of Alabama, and they have both after, full argument, and painstaking investigation, decided in favor of the defendant in error, and we need do no more than refer to the opinions of those two Courts, copied into the record and the late case of O'Connell vs. Reed, 5 C. C., App. 586 and note on page 594, to show that this cause ought to be affirmed on the merits if it should be held that this Court has jurisdiction.

All of which is respectfully submitted by

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